

obligation under clause 18, unless he arranged for this. For that clause obviously binds him to obtain such renewals as are necessary for the purposes of the contract.

In the light of these circumstances I feel compelled to bear in mind the warning on this question of avoiding contracts on account of illegality given by Lord Wright in the Privy Council decision in *Vita Food Products Incorporated v. Unus Shipping Co.*⁽⁶⁾ where he said:—

"Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

There can be no doubt that public policy in the wider sense will be badly served in the circumstances of this case, if the state of the law is such as to require this contract to be nullified in the foregoing circumstances merely because this hydraulic licence was not in the name of the appellants.

These considerations must be viewed also in the light of the further circumstance that, in these proceedings, no claim is made by appellants in respect of the first year's operations, when, if the view of the learned trial judge is sound, the operations were carried on unwittingly by the parties in contravention of the requirements of the Enactment. The claim is directed only to the future, for the principal claim is for specific performance, with an alternative claim for damages, if specific performance is not decreed. A common law claim for the appellants' share of the price obtained for tin produced during the first year of operations, if those operations had been carried out in contravention of the Enactment, might fail. See *Strongman (1945) Ltd. v. Lincock*.⁽⁷⁾ It is quite a different matter where the only claim is for specific performance of a contract which has been part performed to the extent that this contract has, and future performance of which can take place without contravention of the Enactment. Equity leans heavily in favour of ordering specific performance where the claimant has fulfilled his part of the contract to the extent that the appellants have here and both parties have acted under the contract for a considerable period. See *Hart v. Hart* ⁽⁸⁾ per Kay J.:—

"...when an agreement for valuable consideration has been partially performed, the court ought to do its utmost to carry out that agreement by a decree for specific performance."

As I have already pointed out, the hydraulic licence expired on 6th September, 1963, shortly before the end of the first year of operations under the contract, which occurred on 18th September, 1963. Pursuant to clause 18, the res-

pondent must obtain a renewal in a form that is consistent with his obligation under the contract to permit the appellants to work this mining lease. Consequently, even if the judge's view of the Enactment were sound, I see no reason to take the view that continued operations under the contract would necessarily involve these alleged contraventions of the Enactment. In my judgment, therefore, it would not be proper in the circumstances of this case to refuse an order for specific performance of this contract for illegality for the reason that the hydraulic licence in force during the first year of operations was not held in the name of the appellants, even if that had been in contravention of the Enactment.

For this reason also, I would allow this appeal with costs both here and in the court below, and grant a decree for specific performance in respect of the written contract.

I agree with my Lord President that there can be no such order in respect of mining lease No. 12276 for the reasons given by him.

Appeal allowed.

Solicitors: Yeap & Yeap; Shearn, Delamore & Co.

E WEE HOCK GUAN v. CHIA CHIT NEO & ANOR.

[O.C.J. (Winslow J.) April 17, 1964]

[Singapore — Divorce No. 48 of 1962]

Divorce—Adultery—Allegation of—Evidence—Onus and quantum of proof.

F An allegation of adultery must be proved beyond reasonable doubt. The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation.

G Case referred to:—

(1) *Farnham v. Farnham* (1925) 133 L.T. 320.

DIVORCE PETITION.

G. Murugaiyan for the petitioner.

Chan Sek Keong for the respondent.

Robert Hsieh for the co-respondent.

H The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

I Winslow J.: In this case, the petitioner, Mr. Wee Hock Guan, a cashier at the Ocean Park Hotel, asks for dissolution of his marriage to his wife, Madam Chia Chit Neo, on the ground of her adultery with the co-respondent, Mr. Chiam Kim Joo, a schoolmaster.

It is well established that an allegation of this nature must be proved to the satisfaction of the Court beyond reasonable doubt and that the

onus of so satisfying the Court in this case rests upon the petitioner. "The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the Court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the Court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation." (See *Tolstoy* on the Law and Practice of Divorce, 4th Ed. at page 29). As Lord Merrivale P. said in *Farnham v. Farnham* ⁽¹⁾ 320 "The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it".

The facts are as follows:—

(a) The parties were married in 1947 and have 2 children, a boy and a girl born in 1948 and 1949 respectively. They seem to have lived a fairly uneventful though happy life and the husband had no cause for suspicion that his wife had any adulterous tendencies until May 1961 when the co-respondent who had just returned to Singapore from Borneo arrived at the matrimonial home at No. 7 Simon Close and obtained permission from the petitioner's mother-in-law, who was the chief tenant of No. 7 Simon Close to spend a few days there until he could find other accommodation.

(b) It so happened that during the critical week commencing 2nd May 1961 until 9th May 1961, the petitioner was on vacation leave. The co-respondent was temporarily unemployed until 8th May 1961 when he commenced teaching at La Salle School. He therefore used to be in and around the house during the same period. The husband, who was in the habit of "popping in" suddenly in the afternoons and sometimes at night at unexpected times, claims that his arrival always gave cause for alarm to his mother-in-law who alerted the wife by shouting, "He is coming, he is coming". The husband further claims that he found the windows closed in the afternoons and that he became gravely suspicious. He, however, did not succeed in finding his wife in any sort of compromising situation but he was convinced that his mother-in-law was holding a "watching brief", so to speak for the respondent. Not only was the husband suspicious but he was also jealous and he had taken objections in the past to his wife's going out with even her blood-brother.

(c) The co-respondent, who taught the petitioner's son at Charlton School in 1955, became acquainted with the petitioner's wife, who used to accompany the son to school. He later met the petitioner with whom he seems to have been on amicable terms. This acquaintanceship with the respondent ripened into friendship on the "elder sister/younger brother" plane. The co-

A respondent took an interest in the son who was one of the brightest boys in his class and who had expressed a desire to become a Roman Catholic like himself. As he was a young lad, at the time, the co-respondent told him to wait until he was older and could make up his own mind. In January 1960, the co-respondent left Singapore to take up a more lucrative appointment in Borneo. He used to correspond with the respondent, *inter alia*, with regard to the education of the son. I have no reason to believe that the correspondence was otherwise than that of someone who regarded himself as a younger brother to a much older sister, and I can think of no reason why the husband should have harboured any suspicions when the correspondence was not conducted without his knowledge or in any other clandestine way. The co-respondent even wrote to him without response.

(d) Having seen and heard all the parties I have come to the conclusion that the association between the respondent and the co-respondent was, at least until May 1961, a perfectly innocent one so far as any adulterous tendencies or dispositions thereto were concerned.

(e) What seems to have sparked off suspicions in the petitioner's mind, which subsequently began to fester like a sore through the additional germs of jealousy, was the co-respondent's arrival from Borneo to take up temporary residence at No. 7 Simon Close. Apart from the suspicions which he began to entertain when he came home in the afternoons and found the windows closed, he claims that on the morning of 6th or 7th May 1961 just before sunrise, he heard the "sexy voice" of his wife emerging from the adjoining room, occupied by the co-respondent, and that, when he got up to investigate, he found his wife in the narrow passage separating the 2 rooms between which there was no partition save a series of cupboards, and that she appeared to be arranging the top of her pyjama trousers at the waist. He also says that he heard the mother-in-law who had been sleeping in the kitchen outside the two rooms scolding his wife in Malay, "You rascal, you dare to do this work, you got husband" and that the wife replied in Malay "Why should I care; he gave me money. I must give him". It should be noted that there are windows between the two rooms concerned and the kitchen outside.

(f) The last straw that appears to have broken the petitioner's back was an incident which the petitioner claims he witnessed at about 10 p.m. on 8th May 1961, when he says he returned home and found the lights on in the co-respondent's room from inside which he could hear the voices of his wife and the co-respondent. It should be noted that the son also occupied the same room as the co-respondent.

The petitioner tried to peep into the room but could not do so. He eventually found a space below the door about one inch high between the foot of the door and the floor. The floor of the room is about 3 inches higher than the verandah outside and he accordingly found it possible to lie down flat and to peep through the space under the door. He claims that he saw his wife seated on the co-respondent's bed and that they were rubbing each other's genital organs, though fully clothed. He then went into the kitchen and tried to climb on to a chair in order that he could look into the co-respondent's room through the window. Before he could climb the chair, he says that the wife jumped off the bed, switched off the lights and went off through the narrow passage into her own bedroom. The petitioner, however, did nothing further about the matter and, in due course, went to sleep.

(g) It was only next morning that he took her to task about the incident when she informed him that she had been rubbing the co-respondent's forehead. A commotion took place thereafter in which the mother-in-law also joined and the net result was that he slapped his wife and left the house. He returned later in the afternoon when a further commotion took place, involving more relatives of both the petitioner and the wife, at the end of which he says he was driven out with all his things.

So much for the plaintiff's version.

(h) The respondent, supported by her mother and the co-respondent, denies all the allegations of adulterous association. Nor did she drive him out. It was the petitioner who drove out the co-respondent and then left. According to them, the windows were not closed in the afternoons nor did any such incident as that described as occurring on the morning of the 6th or 7th May take place. With regard to the incident which the petitioner claims he witnessed on the night of 8th May through the space under the door, the respondent admits being in the co-respondent's room with the lights on. She explains that she was there for a perfectly innocuous purpose. The co-respondent had complained of a headache and she had given him 2 Aspro tablets and later applied some Tiger Balm to his forehead. The scene was witnessed by the son, who was lying on a bed nearby, wide awake. The son, whose evidence I accept, corroborated the mother in this respect and it is almost impossible to believe that persons who are adulterously inclined would fling discretion to the winds to such an extent as to indulge in illicit relations in full view of the son of one of them with the lights on.

(i) I visited the scene myself with counsel and all parties and had an opportunity of looking through the space under the door. One can only

A see objects inside that room which are not more than a maximum height of 1 foot 6 inches above the floor. The bed in question was not there, since all the parties have moved out of the premises, but it was claimed by the petitioner that the bed was a very low one. His original estimate, in earlier evidence, was "between 2 to 2½ feet high". After my visit to the scene, he claimed that the estimate was wrong and that it was at the most 1 foot 6 inches high. The wife, on the other hand, claims that the bed with the mattress was much higher than that and that, furthermore, all the beds in the house, which have 4 legs apiece, rested on 2 bricks, one on top of the other, per leg. This was for the purpose of enabling her to sweep the floor under the beds more easily, if necessary by having to insert her own body under the beds.

(j) I find that the height of the bed-cum-mattress was probably in the region of about 2 feet above the floor and that all that the petitioner could have seen was that part of the wife's anatomy, covered as it was by trousers, below the knee. I also find that she was standing beside the bed, and perhaps leaning over, applying Tiger Balm to the co-respondent's forehead.

Having made these findings of fact I am unable to conclude that adultery has been proved to my satisfaction beyond a reasonable doubt on the evidence that has been adduced. One cannot help avoiding the conclusion that the petitioner has allowed not only his imagination to run riot but also allowed his inordinate suspicions to see and hear more than he actually saw and heard. Caesar's wife, no doubt, must be above suspicion, but he was no Caesar nor did anyone else suspect her of adultery apart from two very inconsequential witnesses whose evidence is more than inadequate if not useless. Suspicion, however, does not suffice. I realise that it is difficult in cases like this to prove an allegation of adultery. I am satisfied, however, that there is more than a reasonable doubt. In fact there is no evidence of adultery or of even any adulterous tendency or disposition on the part of the respondent and the co-respondent. There is not even the slightest evidence of any previous addiction to immorality. The husband has completely misconstrued the association between his wife and the schoolmaster and I can only conclude that he resented the intrusion of a younger man who was capable of showing a greater interest in his son than he was himself or cared to show. As his wife says, he was a rolling stone, who had had 15 jobs in the preceding 15 years, who cared naught for the welfare of his wife and children and came home at whatever time he liked. It is not surprising that the wife should, to relieve the monotony of an existence in which the husband played no very significant part, have

clutched at the hand of brotherly friendship shown by the co-respondent who was her son's mentor, to prevent herself from sinking into the morass of complete despair. I can only advise the parties now to put their marriage on a proper footing, if they can. I feel that they can do this if only they make an attempt in the interests of the 2 children who are at an age when they need the care and solicitude which only parents can show.

The petition is dismissed with costs. The children will remain in their mother's custody. Liberty to apply.

Petition dismissed.

Solicitors: *David Marshall; Braddell Bros.; Boswell Hsieh & Lim.*

KHOR EWE SUAN & ANOR v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J.) April 24, 1964]

[Alor Star — Kedah Criminal Appeal No. 52 of 1964]

Criminal Procedure — Bail bond — Forfeiture of bond — Failure to take evidence on oath — Whether failure of jurisdiction — Criminal Procedure Code (Cap. 6), ss. 404(i) & 405 — Courts of Judicature Act., 1964, s. 26.

The appellants in this case alleged that their cash bail of \$1,000 which they had deposited had been wrongly forfeited under section 404(i) of the Criminal Procedure Code. They appealed on the ground that there was failure to take evidence on oath as to the forfeiture of the bond and this occasioned a failure of jurisdiction. Consequently the appellants had not been given an opportunity of cross-examining the witness on whose evidence the forfeiture was held to be established.

Held: as the court in this case had not drawn up proceedings against the principal and the sureties evidence should have been led producing the actual bail bond and stating that the bailors were the persons who had entered into the bond. They should then have been given an opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should have been invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required.

Statement in *Mallal's Criminal Procedure*, 4th edn. p. 557 quoted with approval.

Cases referred to:—

(1) *Khor Swee Khim v. Public Prosecutor* [1953] M.L.J. 117.

(2) *Koay Ban Siew v. Public Prosecutor* [1948] M.L.J. 54.

CRIMINAL APPEAL.

Hwang Yang Choo for the appellants.

Wan Ismail bin Wan Mohamed Salleh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: This was an appeal by two bailors that their cash bail of \$1,000 which they had deposited had been wrongly forfeited by the

learned president under section 404(i) of the Criminal Procedure Code.

The grounds of appeal were that the learned president had failed to have taken evidence on oath as to the forfeiture of the bond and this occasioned a failure of jurisdiction. The appellants had consequently not been given an opportunity of cross-examining the witness or witnesses on whose evidence the forfeiture was held to be established.

Section 404(i) of the Criminal Procedure Code reads as follows:—

"404(i) Whenever it is proved to the satisfaction of the court by which a bond under this code has been taken, or when the bond is for appearance before a court, whenever it is proved to the satisfaction of such court,

that such bond has been forfeited, the court shall record the grounds of such proof and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid."

In *Mallal's Criminal Procedure*, 4th edition, when considering the comparable provisions of section 416 of the Singapore Criminal Procedure Code the author states as follows:—

"Whenever it is Proved.—The words 'whenever it is proved' imply that evidence on oath should be taken by the magistrate as to the forfeiture of the bond, before calling on the party bound thereby to pay the penalty or show cause why he should not do so. The use of words 'whenever it is proved' makes it necessary that the evidence should be taken and recorded by the magistrate in the usual way in order to afford a foundation for his jurisdiction to call on the party to show cause and to declare his recognizance forfeited. When this is not done, there is failure of jurisdiction, and the defect cannot be cured by silence, neglect or waiver, positive or negative, of the party interested. See *Re Birbhan*, 11 B. H. C. R. 170.

The proceeding to realize a penalty is in the nature of civil proceedings, and the person against whom it is held, is competent to give evidence on oath in his own behalf, and also entitled to call evidence. *Re Buksh*, 15 W.R. 87. There must be a regular judicial trial and legal inquiry before the punishment can be inflicted. *Re Chowdhry*, 12 W.R. 54. The evidence on which the court is satisfied that the forfeiture has been incurred and that the person bound by the bond should be called upon to pay or to show cause, may be taken in the absence of such person, but the final order making him liable cannot be made without taking evidence in his presence or giving him an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established. *R. v. Chowdhury*, I.L.R. 25 Cal. 440. Evidence taken in a different trial cannot be admitted for the purpose of inquiry under this section against the accused. See *Re Chowdhry*, *supra*. But the judgment in which the person is convicted would be admissible against the principal or the surety.

There is a palpable distinction between bonds which are not, and those which are, for appearance before a court. Proof other than is directly before the court in its own record is required in the former and not in the latter.

Where a court had before it the order for bail, the bail-bond, and the fact that the sureties had not produced the accused, and upon these materials drew up proceedings against the principal and the sureties under